



[Billing Code: 6750-01S]

FEDERAL TRADE COMMISSION

16 CFR Part 425

RIN 3084-AB54

Rule Concerning the Use of Prenotification Negative Option Plans

AGENCY: Federal Trade Commission.

ACTION: Advance notice of proposed rulemaking; request for public comment.

SUMMARY: The Federal Trade Commission (“FTC” or “Commission”) seeks public comment on the need for amendments to the Commission’s “Rule Concerning the Use of Prenotification Negative Option Plans” (*i.e.*, “Negative Option Rule” or “Rule”) to help consumers avoid recurring payments for products and services they did not intend to order and to allow them to cancel such payments without unwarranted obstacles.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY**

INFORMATION section below. Write “16 CFR Part 425—Negative Option Rule, Project No. P064202” on your comment, and file your comment online at <https://www.regulations.gov/>, by following the instructions on the web-based form. If you prefer to file your comment on paper, write “Negative Option Rule (16 CFR Part 425) (Project No. P064202)” on your comment and on the envelope, and mail it to the following address: Federal Trade Commission, Office of the Secretary, 600

Pennsylvania Avenue NW, Suite CC-5610 (Annex J), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

FOR FURTHER INFORMATION CONTACT: Hampton Newsome (202-326-2889), Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Overview

The Commission seeks comments on ways to improve its existing regulations for negative option marketing, a common form of marketing where the absence of affirmative consumer action constitutes assent to be charged for goods or services. Negative option offers are widespread in the marketplace and can provide substantial benefits for sellers and consumers. However, consumers cannot reap such benefits when marketers fail to make adequate disclosures, bill consumers without their consent, or make cancellation difficult or impossible. Over the years, such problematic negative option practices have remained a persistent source of consumer harm, often saddling consumers with recurring payments for products and programs they did not intend to purchase or did not want. In the past, the Commission has sought to address such practices through individual law enforcement cases and a patchwork of regulations. Nevertheless, problems persist, and consumers continue to submit thousands of

complaints to the FTC each year about negative option marketing. To address these concerns, the Commission seeks comments on ways to improve existing regulatory requirements, including whether it should use its rulemaking authority under the FTC Act to expand the scope and coverage of the existing Negative Option Rule.¹

II. Negative Option Marketing

A “negative option” is any type of sales term or condition that allows a seller to interpret a customer’s silence, or failure to take an affirmative action, as acceptance of an offer.² Negative option marketing generally falls into four categories: prenotification negative option plans, continuity plans, automatic renewals, and free-to-pay or nominal-fee-to-pay conversion offers.

Prenotification plans are the only negative option practice currently covered by the Commission’s Negative Option Rule. Under such plans (*e.g.*, book-of-the-month clubs), sellers send periodic notices offering goods to participating consumers and then send—and charge for—those goods only if the consumers take no action to decline the offer. The periodic announcements and shipments can continue indefinitely. In continuity plans, consumers agree in advance to receive periodic shipments of goods or provision of services (*e.g.*, bottled water delivery), which they continue to receive until

¹ Section 18 of the FTC Act authorizes the Commission to promulgate rules specifying acts or practices in or affecting commerce which are unfair or deceptive. 15 U.S.C. 57a(a)(2).

² The Commission’s Telemarketing Sales Rule defines a negative option feature as a provision in an offer or agreement to sell or provide any goods or services “under which the customer’s silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.” 16 CFR 310.2(w).

they cancel the agreement. In automatic renewals, sellers (*e.g.*, a magazine publisher) automatically renew consumers' subscriptions when they expire and charge for them, unless consumers affirmatively cancel the subscriptions. Finally, in free-to-pay or nominal-fee-to-pay plans, consumers receive goods or services for free (or at a nominal fee) for a trial period. After the trial period, sellers automatically begin charging a fee (or higher fee) unless consumers affirmatively cancel or return the goods or services.

Some negative option offers include upsell or bundled offers, where sellers use consumers' billing data for additional products from the same seller or pass consumers' billing data to a third party for additional offers. An upsell occurs when a consumer completes a first transaction and then receives a solicitation for an additional product or service. A bundled offer occurs when a seller packages two products or services together so that they cannot be purchased separately.

III. FTC's Negative Option Rule

The Commission first promulgated the Rule in 1973 pursuant to the FTC Act, 15 U.S.C. 41 *et seq.*, after finding that some negative option marketers had committed unfair and deceptive marketing practices that violated Section 5 of the Act, 15 U.S.C. 45. As discussed above, the Rule only applies to prenotification plans for the sale of goods and does not reach most modern negative option marketing.³

³ The Rule defines "negative option plan" narrowly to apply only to prenotification plans. 16 CFR 425.1(c)(1). The Rule covers prenotification plan marketing in all media. In 1998, the Commission clarified that the Rule "covers all promotional materials that contain a means for consumers to subscribe to prenotification negative option plans, including those that are disseminated through newer technologies" 63 FR 44555, 44561 (Aug. 20, 1998).

The Rule requires prenotification plan sellers to clearly and conspicuously disclose their plan's material terms before consumers subscribe. It enumerates seven material terms sellers must disclose clearly and conspicuously including: (1) how subscribers must notify the seller if they do not wish to purchase the selection; (2) any minimum purchase obligations; (3) the subscribers' right to cancel; (4) whether billing charges include postage and handling; (5) that subscribers have at least ten days to reject a selection; (6) that if any subscriber is not given ten days to reject a selection, the seller will credit the return of the selection and postage to return the selection, along with shipping and handling; and (7) the frequency with which announcements and forms will be sent.⁴ In addition, sellers must follow certain procedures, including: abiding by particular time periods during which sellers must send introductory merchandise and announcements identifying merchandise the seller plans to send; giving consumers a specified period to respond to announcements; providing instructions for rejecting merchandise in announcements; and promptly honoring written requests to cancel from consumers who have met any minimum purchase requirements.⁵

IV. Existing Regulatory Requirements

In addition to the Negative Option Rule, several other statutes and regulations address harmful negative option practices. First, Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices, has traditionally served as the Commission's primary mechanism for addressing these types of cases. Additionally, the

⁴ 16 CFR 425.1(a)(1)(i)-(vii).

⁵ 16 CFR 425.1(a)(2) and (3); 425.1(b).

Restore Online Shoppers' Confidence Act ("ROSCA") (15 U.S.C. 8401-8405), the Telemarketing Sales Rule (16 CFR Part 310), the Postal Reorganization Act ("PRA") (*i.e.*, the Unordered Merchandise Statute) (39 U.S.C. 3009), and the Electronic Fund Transfer Act ("EFTA") (15 U.S.C. 1693-1693r) all address various aspects of negative option marketing. ROSCA, however, is the only law primarily designed to do so.

A. Section 5 of the FTC Act

The basic consumer protection statute enforced by the Commission is Section 5(a) of the FTC Act (15 U.S.C. 45(a)(1)). This provision states that "unfair or deceptive acts or practices in or affecting commerce ... are ... declared unlawful."⁶ In past guidance and cases, the FTC has highlighted five basic Section 5 requirements that negative option marketing must follow to avoid deception.⁷ First, marketers must disclose the material

⁶ The FTC Act defines "unfair or deceptive acts or practices" to include such acts or practices involving foreign commerce that cause or are likely to cause reasonably foreseeable injury within the United States or involve material conduct occurring within the United States (15 U.S.C. 45(a)(4)(A)). It also defines "unfair" practices as those that cause or are likely "to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition" (15 U.S.C. 45(n)).

⁷ See *Negative Options: A Report By the Staff of the FTC's Division of Enforcement*, 26-29 (Jan. 2009), <https://www.ftc.gov/sites/default/files/documents/reports/negative-options-federal-trade-commission-workshop-analyzing-negative-option-marketing-report-staff/p064202negativeoptionreport.pdf>. In discussing the five principal Section 5 requirements related to negative options, the report cites to the following pre-ROSCA cases, *FTC v. JAB Ventures*, No. CV08-04648 (C.D. Cal. 2008); *FTC v. Complete Weightloss Center*, No. 1:08cv00053 (D.N.D. 2008); *FTC v. Berkeley Premium Nutraceuticals*, No. 1:06cv00051 (S.D. Ohio 2006); *FTC v. Think All Publ'g*, No. 4:07cv11 (E.D. Tex. 2006); *FTC v. Hispanexo*, No. 1:06cv424 (E.D. Va. 2006); *FTC v. Consumerinfo.com*, No. SACV05-801 (C.D. Cal. 2005); *FTC v. Conversion Mktg.*, No. SACV04-1264 (C.D. Cal. 2004); *FTC v. Mantra Films*, No. CV03-9184 (C.D. Cal. 2003); *FTC v. Preferred Alliance*, No. 103-CV0405 (N.D. Ga. 2003); *United States v. Prochnow*, No. 102-CV-917 (N.D. Ga. 2002); *FTC v. Ultralife Fitness, Inc.*, No. 2:08-cv-

terms of a negative option offer including, at a minimum, the following key terms: the existence of the negative option offer; the offer's total cost; the transfer of a consumer's billing information to a third party, if applicable; and how to cancel the offer. Second, Section 5 requires that disclosures be clear and conspicuous. Third, sellers must disclose the material terms of the negative option offer before consumers agree to the purchase. Fourth, marketers must obtain consumers' consent to such offers. Finally, marketers must not impede the effective operation of promised cancellation procedures, and should honor cancellation requests that comply with such procedures.

Although adherence to these five principles should minimize the likelihood of non-compliance with Section 5, the legality of a particular negative option depends on an individualized assessment of the advertisement's net impression and the marketer's business practices. In addition to these deception-related requirements, the Commission has indicated that billing consumers without consumers' express informed consent is an unfair act under the FTC Act.⁸

B. ROSCA

Enacted by Congress in 2010 to address ongoing problems with online negative option marketing, ROSCA contains general provisions related to disclosures, consent,

07655-DSF-PJW (C.D. Cal. 2008); *In the Matter of America Isuzu Motors*, FTC Docket No. C-3712 (1996); *FTC v. Universal Premium Services*, No. CV06-0849 (C.D. Cal. 2006); *FTC v. Remote Response*, No. 06-20168 (S.D. Fla. 2006); and FTC's *Dot Com Disclosures* guidance.

⁸ Courts have found unauthorized billing to be unfair under the FTC Act. *See, e.g., FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157-59 (9th Cir. 2010), *amended by* 2010 WL 2365956 (9th Cir. June 15, 2010); *FTC v. Amazon.com, Inc.*, No. C14-1038-JCC, 2016 WL

and cancellation.⁹ ROSCA prohibits charging or attempting to charge consumers for goods or services sold on the Internet through any negative option feature unless the marketer: (1) clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer's billing information; (2) obtains a consumer's express informed consent before charging the consumer's account; and (3) provides simple mechanisms for the consumer to stop recurring charges.¹⁰ ROSCA, however, provides no details regarding steps marketers must follow to comply with these provisions.

ROSCA also addresses offers made by, or on behalf of, third-party sellers during, or immediately following, a transaction with an initial merchant.¹¹ In connection with these offers, ROSCA prohibits post-transaction, third-party sellers from charging or attempting to charge consumers unless the seller: (1) before obtaining billing information, clearly and conspicuously discloses the offer's material terms; and (2) receives the consumer's express informed consent by obtaining the consumer's name, address, contact information, as well as the full account number to be charged, and requiring the consumer to perform an additional affirmative action indicating consent.¹² ROSCA also prohibits initial merchants from disclosing billing information to any post-

10654030, at *8 (W.D. Wash. Apr. 26, 2016); *FTC v. Ideal Fin. Sols., Inc.*, No. 2:13-CV-00143-JAD, 2015 WL 4032103, at *8 (D. Nev. June 30, 2015).

⁹ 15 U.S.C. 8401-8405.

¹⁰ 15 U.S.C. 8403. ROSCA incorporates the definition of "negative option feature" from the Commission's Telemarketing Sales Rule, 16 CFR 310.2(w).

¹¹ ROSCA defines "post-transaction third-party seller" as a person other than the initial merchant who sells any good or service on the Internet and solicits the purchase on the Internet through an initial merchant after the consumer has initiated a transaction with the initial merchant. 15 U.S.C. 8402(d)(2).

¹² 15 U.S.C. 8402(a).

transaction third-party seller for use in any Internet-based sale of goods or services.¹³

ROSCA provides that a violation of that Act shall be treated as a violation of a Commission trade regulation rule under Section 18 of the FTC Act.¹⁴ Thus, the Commission may seek a variety of remedies for violations of ROSCA, including civil penalties under Section 5(m)(1)(A) of the FTC Act;¹⁵ injunctive and equitable monetary relief under Section 13(b) of the FTC Act;¹⁶ and consumer redress, damages, and other relief under Section 19 of the FTC Act.¹⁷ Although Congress charged the Commission with enforcing ROSCA, it did not specifically direct the FTC to promulgate implementing regulations.¹⁸

C. Telemarketing Sales Rule

The Telemarketing Sales Rule (“TSR”) (16 CFR Part 310) prohibits deceptive telemarketing acts or practices, including those involving negative option offers, and certain types of payment methods common in deceptive marketing. The TSR only applies to negative option offers made over the telephone. Specifically, the TSR requires that telemarketers disclose all material terms and conditions of the negative option feature, including the need for affirmative consumer action to avoid the charges, the date (or dates) the charges will be submitted for payment, and the specific steps the customer

¹³ 15 U.S.C. 8402(b).

¹⁴ 15 U.S.C. 8404. Section 18 of the FTC Act is 15 U.S.C. 57a.

¹⁵ 15 U.S.C. 45(m)(1)(A).

¹⁶ 15 U.S.C. 53(b).

¹⁷ 15 U.S.C. 57b(a)(1) and (b).

¹⁸ ROSCA states that a violation “of this chapter or any regulation prescribed under this chapter shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices. 15

must take to avoid the charges. It also prohibits telemarketers from misrepresenting such information and contains specific requirements related to payment authorization.¹⁹ The Commission recently amended the TSR to prohibit the use of payment methods often used in deceptive marketing, including negative options, such as remotely created checks.²⁰

D. Other Relevant Requirements

The Electronic Fund Transfer Act (“EFTA”)²¹ and the Postal Reorganization Act (“PRA”) (*i.e.*, Unordered Merchandise Statute) also contain provisions that address negative option marketing.²² EFTA prohibits sellers from imposing recurring charges on a consumer’s debit cards or bank accounts without written authorization.²³ The PRA provides that mailing unordered merchandise, or a bill for such merchandise, constitutes an unfair method of competition and an unfair trade practice in violation of Section 5 of the FTC Act.²⁴

U.S.C. 8404(a).

¹⁹ 16 CFR 310.3(a).

²⁰ 80 FR 77520 (Dec. 14, 2015). The TSR Notice of Proposed Rulemaking (78 FR 41200 (July 9, 2013)) noted negative option cases where the defendants used unauthorized remotely created checks. *E.g.*, *FTC v. FTN Promotions, Inc.*, Civ. No. 8:07-1279 (M.D. Fla. Dec. 30, 2008) (Stip. Perm. Inj.) (defendants allegedly caused more than \$171 million in unauthorized charges to consumers’ accounts for bogus travel and buyers’ clubs in part by using unauthorized remotely created checks).

²¹ 15 U.S.C. 1693-1693r.

²² 39 U.S.C. 3009.

²³ EFTA provides that the Commission shall enforce its requirements, except to the extent that enforcement is specifically committed to some other federal government agency, and that a violation of any of its requirements shall be deemed a violation of the FTC Act. Accordingly, the Commission has authority to seek the same injunctive and monetary equitable relief for EFTA violations that it can seek for other Section 5 violations.

²⁴ The Commission has authority to seek the same remedies for PRA violations that it can

V. Limitations of Existing Regulatory Requirements

The existing patchwork of laws and regulations does not provide industry and consumers with a consistent legal framework across different media and types of plans. For instance, as discussed above, the current Rule does not cover common practices such as continuity plans, automatic renewals, and trial conversions.²⁵ In addition, ROSCA and the TSR do not address negative option plans in all media—ROSCA’s general statutory prohibitions on deceptive negative option marketing only apply to Internet sales, and the TSR’s more specific provisions only apply to telemarketing. Furthermore, harmful negative option practices that fall outside of ROSCA and the TSR’s coverage still occur.²⁶ Therefore, under the current framework, different rules apply depending on whether a negative option offer is made online, over the phone, or in some other medium (*e.g.*, in print, through the mail, etc.).

Additionally, the current framework does not provide clarity about how to avoid deceptive negative option disclosures and procedures. For example, ROSCA lacks specificity about cancellation procedures and the placement, content, and timing of

seek for other Section 5 violations. For example, the Commission can seek civil penalties pursuant to Section 5(m)(1)(B) of the FTC Act from violators who have actual knowledge that the Commission has found mailing unordered merchandise unfair.

²⁵ Indeed, the prenotification plans covered by the Rule represent only a small fraction of negative option marketing. In 2017, for instance, the Commission estimated that fewer than 100 sellers (“clubs”) were subject to the current Rule’s requirements. 82 FR 38907, 38908 (Aug. 16, 2017).

²⁶ For instance, the Commission recently brought two cases under Section 5 involving negative option plans that did not involve either Internet sales or telemarketing. *FTC and State of Maine v. Health Research Laboratories, LLC*, No. 2:17-cv-00467-JDL (D. Me. 2018); and *FTC and State of Maine v. Marketing Architects*, No. 2:18-cv-00050 (D. Me. 2018).

cancellation-related disclosures. Instead, the statute requires marketers to provide a “simple mechanism” for the consumer to stop recurring charges, but does not specify what methods would satisfy this requirement.

VI. Past FTC Rulemaking Efforts

The Commission initiated its last regulatory review of the Negative Option Rule in 2009 (74 FR 22720 (May 14, 2009)), following a 2007 FTC workshop and subsequent Staff Report.²⁷ The Commission completed the review in 2014 (79 FR 44271 (July 31, 2014)). At the time, the Commission found the comments supporting the Rule’s expansion “argue convincingly that unfair, deceptive, and otherwise problematic negative option marketing practices continue to cause substantial consumer injury, despite determined enforcement efforts by the Commission and other law enforcement agencies.”²⁸ It also noted that practices not covered by the Rule (*e.g.*, trial conversions and continuity plans) accounted for most of its enforcement activity in this area. Despite

²⁷ See *Negative Options: A Report By the Staff of the FTC’s Division of Enforcement* 26-29, <https://www.ftc.gov/sites/default/files/documents/reports/negative-options-federal-trade-commission-workshop-analyzing-negative-option-marketing-report-staff/p064202negativeoptionreport.pdf>.

²⁸ The Commission cited a number of its law enforcement actions challenging negative option marketing practices, including, for example, *FTC v. Process America, Inc.*, No. 14-0386-PSG-VBKx (C.D. Cal. 2014) (processing of unauthorized charges relating to negative option marketing); *FTC v. Willms*, No. 2:11-cv-00828 (W.D. Wash. 2011) (Internet free trials and continuity plans); *FTC v. Moneymaker*, No. 2:11-cv-00461-JCM-RJJ (D. Nev. 2012) (Internet trial offers and continuity programs); *FTC v. Johnson*, No. 2:10-cv-02203-RLH-GWF (D. Nev. 2010), (Internet trial offers); and *FTC v. John Beck Amazing Profits, LLC*, No. 2:09-cv-04719 (C.D. Cal. 2009) (infomercial and telemarketing trial offers and continuity programs); see also “An Overview of the FTC’s Enforcement Actions Concerning Negative Option Marketing,” a presentation delivered during the Commission’s 2007 “Negative Options: An FTC Workshop Analyzing Negative Option Marketing,” <https://www.ftc.gov/news-events/events->

these findings, the Commission declined to expand or enhance the Rule, concluding that amendments were not warranted because the enforcement tools provided by the TSR and, especially, ROSCA, which had only recently become effective, might prove adequate to address the persistent problems generated by deceptive and unfair negative option marketing. However, the Commission also explained that, if ROSCA and its other enforcement tools do not adequately protect consumers, the Commission could consider, based on a more complete record, whether and how to amend the Rule.²⁹

VII. Ongoing Problems with Negative Option Marketing

Since the conclusion of the last regulatory review of the Negative Option Rule, evidence strongly suggests that negative option marketing continues to harm consumers. The Commission and the states continue to regularly bring cases challenging negative option practices, including more than 20 recent FTC cases. These matters involved a range of deceptive and unfair practices, including inadequate disclosures for “free” offers and other products or programs, enrollment without consumer consent, and inadequate or overly burdensome cancellation and refund procedures.³⁰ In addition, the Commission

calendar/2007/01/negative-options-workshop-analyzing-negative-option-marketing.

²⁹ 79 FR at 44276.

³⁰ Examples of these matters include: *FTC v. Credit Bureau Center, LLC*, No. 17-cv-00194 (N.D. Ill. 2018); *FTC v. JDI Dating, Ltd.*, No. 1:14-cv-08400 (N.D. Ill. 2018); *FTC, State of Illinois, and State of Ohio v. One Technologies, LP*, No. 3:14-cv-05066 (N.D. Cal. 2014); *FTC v. Health Formulas, LLC*, No. 2:14-cv-01649-RFB-GWF (D. Nev. 2016); *FTC v. Nutraclick LLC*, No. 2:16-cv-06819-DMG (C.D. Cal. 2016); *FTC v. XXL Impressions*, No. 1:17-cv-00067-NT (D. Me. 2018); *FTC v. AAFE Products Corporation*, NO. 3:17-cv-00575 (S.D. Cal. 2017); *FTC v. Pact Inc.*, No. 2:17-cv-1429 (W.D. Wash. 2017); *FTC v. Tarr*, No. 3:17-cv-02024-LAB-KSC (S.D. Cal. 2017); *FTC v. AdoreMe, Inc.*, No. 1:17-cv-09083 (S.D.N.Y. 2017); *FTC v. DOTAuthority.com, Inc.*, No. 0:16-cv-62186-WJZ (S.D. Fla. 2018); *FTC v. Bunzai Media Group, Inc.*, No. CV15-

continues to receive thousands of complaints each year related to negative option marketing. The recent cases and the high volume of ongoing complaints suggests there is prevalent, unabated consumer harm in the marketplace. As discussed below, the Commission seeks comments on these issues.

VIII. Request for Comments

The Commission seeks comments on the current Rule as well as possible regulatory measures to reduce consumer harm created by deceptive or unfair negative option marketing. In considering ways to meet this objective, as detailed below, the Commission seeks comment on various alternatives, including amendments to existing rules to further address disclosures, consumer consent, and cancellation. In particular, the Commission requests input on whether and how it should use its authority under Section 18 of the FTC Act to expand the Negative Option Rule to address prevalent unfair or deceptive practices involving negative option marketing.³¹ It also seeks comment on other approaches, such as the publication of additional consumer and business education. The Commission seeks any suggestions or alternative methods for improving current

04527-GW(PLAx) (C.D. Cal. 2018); and *FTC v. RevMountain, LLC*, No. 2:17-cv-02000-APG-GWF (D. Nev. 2018).

³¹ Section 202 of the Magnuson-Moss Warranty-FTC Improvements Act authorizes the Commission to promulgate rules that define with specificity acts or practices in or affecting commerce which are unfair or deceptive. FTC Act Section 18(a)(1)(B) (15 U.S.C. 57a(a)(1)(B)). Under FTC Act Section 18(b)(3), the Commission may issue regulations “where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.” The Commission may make such a prevalence finding if it has issued cease and desist orders regarding such acts or practices, or any other available information indicates a widespread pattern of unfair or deceptive acts or practices. Rules under Section 18 “may include requirements prescribed for the purpose of preventing such acts or practices.”

requirements. In their replies, commenters should provide any available evidence and data that supports their position, such as empirical data, consumer perception studies, and consumer complaints.

General Questions about the Current Rule

- (1) Is there a continuing need for the Rule as currently promulgated? Why or why not?
- (2) What benefits has the Rule provided to consumers? What evidence supports the asserted benefits?
- (3) What modifications, if any, should the Commission make to the Rule to increase its benefits to consumers?
 - (a) What evidence supports your proposed modifications?
 - (b) How would these modifications affect the costs and benefits of the Rule for consumers?
 - (c) How would these modifications affect the costs and benefits of the Rule for businesses, particularly small businesses?
- (4) What, if any, impact has the Rule had on the flow of truthful information to consumers and on the flow of deceptive information to consumers? What evidence supports the asserted impact?
- (5) What, if any, significant costs has the Rule imposed on consumers? What evidence supports the asserted costs?
- (6) Are any of the Rule's requirements no longer needed? If so, explain. Please provide supporting evidence.

- (7) What benefits, if any, has the Rule provided to businesses, and in particular to small businesses? What evidence supports the asserted benefits?
- (8) What modifications, if any, should the Commission make to the Rule to increase its benefits to businesses, particularly small businesses?
 - (a) What evidence supports your proposed modifications?
 - (b) How would these modifications affect the costs and benefits of the Rule for consumers?
 - (c) How would these modifications affect the costs and benefits of the Rule for businesses?
- (9) What, if any, significant costs, including costs of compliance, has the Rule imposed on businesses, particularly small businesses? What evidence supports the asserted costs?
- (10) What modifications, if any, should the Commission make to the Rule to reduce the costs imposed on businesses, particularly small businesses?
- (11) Should the Rule define “clearly and conspicuously,” given that it requires marketers to make certain disclosures clearly and conspicuously? If so, why, and how? If not, why not?
- (12) What evidence is available concerning the degree of compliance with the Rule? Does this evidence indicate that the Commission should modify the Rule? If so, why, and how? If not, why not?
- (13) Does the Rule overlap or conflict with other federal, state, or local laws or regulations? If so, how? Should the Rule be modified to address any such

overlaps or conflicts? If so, why, and how? If not, why not? Please provide supporting evidence.

Questions about Negative Option Practices and the Existing Legal Framework

- (14) How widespread is the marketing of products or services through negative option plans, including, but not limited to, plans covered by the current Rule? What percentage of these negative option plans are offered through the Internet, telemarketing, the mail, or through some other means? What data sources did you rely upon in formulating your answer?
- (15) Are there potentially unfair or deceptive practices concerning the marketing of negative option plans, not covered by the Rule, occurring in the marketplace? If so, what types of negative option plans does such marketing involve? What evidence, such as empirical data, consumer perception studies, or consumer complaints, demonstrates whether there is widespread existence of such practices? Please provide this evidence.
- (16) Does current marketing of negative option plans cause consumer injury? If so, what evidence demonstrates that such practices cause consumer injury do so? Please provide this evidence.
- (17) Please provide any evidence that has become available over the last several years concerning consumer perception of, or experience with, negative option offers, including offers for prenotification negative option plans, continuity plans, trial conversions, or automatic renewals.

- (18) How do the existing laws and regulations covering negative options affect consumers? What evidence supports your answer?
- (19) Do existing laws and regulations covering negative options affect businesses, particularly small businesses? If so, how? What evidence supports your answer?
- (20) Is there a need for new regulatory provisions to prevent deception by addressing negative option plans not covered by the Rule? If yes, why? If no, why not? If new regulations are needed to address the marketing of negative option plans not covered by the existing Rule, should the Rule be amended, or should a new Rule or Rules be created? Should all forms of negative option marketing be addressed in a single Rule or by new, separate Rules? What evidence supports your answer?
- What are the benefits and costs to consumers and businesses under either approach? What evidence supports your answer?
- (21) If new regulatory provisions are necessary, should they treat various types of negative option marketing differently? Why or why not? Would there be any adverse consequences if different forms of negative option marketing were addressed under separate Rules? Why or why not? What, if any, evidence supports your answer?
- (22) What specific modifications, if any, should be added to the Rule to better address prenotification negative option marketing, continuity plans, trial conversions, and/or automatic renewals? What evidence supports your proposed modification?

- (23) Do current or impending changes in technology or market practices affect whether and how the Rule should be modified? If so, what are such changes and how do they affect whether the Rule should be modified?
- (24) Are there foreign or international laws, regulations, or standards addressing negative option plans that the Commission should consider as it reviews the Rule? If so, what are they? Should the Commission consider adopting, or avoiding, any of these? If so, why? If not, why not?
- (a) Should the Rule be modified to harmonize with these international laws, regulations, or standards? If so, why, and how? If not, why not?
- (b) How would such harmonization affect the costs and benefits of the Rule for consumers and businesses, particularly small businesses?
- (25) Should the Commission consider additional consumer and business education to reduce consumer harm associated with negative option marketing? If so, what should such education materials include, and how should the Commission communicate that information to consumers and businesses?

IX. Comment Submissions

You can file a comment online or on paper. For the FTC to consider your comment, we must receive it on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Write “Negative Option Rule (16 CFR Part 425) (Project No. P064202)” on your comment. Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online, or to send them to the Commission by

courier or overnight service. To make sure that the Commission considers your online comment, you must file it through the <https://www.regulations.gov> website by following the instructions on the web-based form provided. Your comment—including your name and your state—will be placed on the public record of this proceeding, including the <https://www.regulations.gov> website. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the [regulations.gov](https://www.regulations.gov) site.

If you file your comment on paper, write “Negative Option Rule (16 CFR Part 425) (Project No. P064202)” on your comment and on the envelope, and mail it to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at www.regulations.gov, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your

comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or confidential”—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record.

See FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at www.regulations.gov, we cannot redact or remove your comment unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE

FEDERAL REGISTER]. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

By direction of the Commission.

April J. Tabor,

Acting Secretary.

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